AHMANI SDN BHD

v.

ABU KARIM BAHAROM & ORS

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CIVIL APPEAL NO: 16-1-1997]
20 DECEMBER 1999

LABOUR LAW: *Employment - Director General of Labour, complaints and inquiries - Procedure - Examination of complainant on oath or affirmation - Failure to follow procedure - Whether a fatal illegality - Whether merely a curable irregularity - Whether inquiry proceedings invalidated - Employment Act 1955, s. 70(b) - Oaths and Affirmations Act 1949, s. 12 - Whether Director General correct in finding contract of service between company and employees*

WORDS & PHRASES: *"Oaths and affirmations" - Definition - Bahasa Malaysia translation - "Sumpah" - "Berikrar" - "Mengesahkan" - "Confirm"*

This was an appeal from the order of the Ketua Pengarah Buruh made under s. 69 of the Employment Act 1955 ('the Act') ordering the employer ('appellant') to pay to the Pengarah Buruh Melaka on behalf of the employees ('respondents') outstanding wages amounting to RM19,705.39. Dissatisfied, the appellant appealed on the following grounds: (a) jurisdiction, going to the root of the entire enquiry, questioning the authority of the Director General in conducting the entire proceedings, and (b) whether the appellant and the respondents had entered into an agreement for a "contract of service" or a "contract for service".

Held:

[1] From the wordings and the flow of the procedural sequence set out in s. 70 of the Act, it is clear and unambiguous that before any summons in the prescribed form is issued against the party complained against, the Director General must examine the complainant on oath or affirmation.

[2] The requirement under s. 70(b) of the Act for the Director General to examine the complainant on oath or affirmation as soon as practicable after the complainant has presented a written statement of his complaint under s. 70(a) of the Act is mandatory. However, as to whether a failure to administer the oath or to affirm the complainant before

examining him can amount to a defect that goes to jurisdiction rendering all subsequent proceedings and steps taken under s. 70 of the Act void, is a question that can be readily determined, upon a careful perusal of the Oaths and Affirmations Act 1949.

[3] Section 12 of the Oaths and Affirmations Act 1949 clearly provides that the said defect, if any, was a mere irregularity and did not go to the root of jurisdiction. The irregularity, upon a consideration of the whole proceedings before the Director General, had not occasioned any injustice to the appellant. The defect was not an illegality. The irregularity was more than sufficiently cured when all the evidence recorded on behalf of both the appellant and the respondents at the enquiry was in fact taken on oath.

[4] The Director General had made a correct finding that the contract between the respondents and the appellant was a contract of service, and that the respondents were entitled to the claims made by them. The Director General had meticulously applied the formula provided in s. 60 of the Act and had set the same out in his grounds of decision.

[Appeal dismissed; order of Director General affirmed.]

Legislation referred to:
Employment Act 1955, ss. 60B, 60I, 69, 70(a), (b), (c), (g), Part XII
Oaths and Affirmations Act 1949, ss. 6, 7, 9, 12

Other source(s) referred to:
Istilah Undang-Undang, Dewan Bahasa dan Pustaka, Edisi Semakan 1986
Jowitts Dictionary of English Law, 2nd edn
The Concise Oxford Dictionary, 5th edn

For the appellant - Fatima Tahir Ali; M/s SF Pang & Chandra
For the respondents - Leela Chelvarajah; M/s Go Tiong Siew & Assoc

Reported by Farah Naim

JUDGMENT

KN Segara J:

This is an appeal from the order of the Ketua Pengarah Buruh made on 8 April 1997 under s. 69 of the Employment Act 1955 ordering the appellant/employer to pay to the Pengarah Buruh Melaka on behalf of the respondents/employees for:

1) wages for working on rest day;

2) wages for working on public holidays;

3) wages *in lieu* of notice of termination;

amounting to RM19,705.39.

The appellant has raised as its first ground, in the memorandum of appeal, a very salient and important ground, that is jurisdiction. The appellant is going to the root of the entire enquiry and questioning the authority of the Director General in conducting the entire proceedings. The point raised is under s. 70 of the Employment Act 1955 (and I quote the said s. 70 to the extent relevant for the decision):

> The procedure for disposing of questions arising under sections 69, 69B and 69C shall be as follows:
>
> (a) the person complaining shall present to the Director General a written statement of his complaint and of the remedy which he seeks or he shall in person make a statement to the Director General of his complaint and of the remedy which he seeks;
>
> (b) the Director General shall as soon as practicable thereafter examine the complainant on oath or affirmation and shall record the substance of the complainant's statement in his case book;
>
> (c) the Director General may make such inquiry as he deems necessary to satisfy himself that the complaint discloses matters which in his opinion ought to be inquired into and may summon in the prescribe form the person complained against, or if it appears to him without any inquiry that the complaint discloses matters which ought to be inquired into he may forthwith summon the person complained against:
>
> Provided that if the person complained against attends in person before the Director General it shall not be necessary to serve a summons upon him;
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> (d) ...;
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> (e) ...;
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> (f) ...;
>
> (g) ...;
>
> (h) ...;
>
> (i) ...;

From the wording and the flow of the procedural sequence set out in s. 70 of the Employment Act 1955, it is clear and unambiguous that before any summons in the prescribed form is issued against the party complained, the Director General must examine the complainant on oath or affirmation (s. 70(b)).

Page 2 of the Record of Appeal shows that there has been compliance with s. 70(a) of the Employment Act 1955 when a Labour Officer, that is one Encik C. Pathmanapan recorded the complaint of the respondents on 10 April 1991. A perusal of p. 4 of the Record of Appeal shows that a Labour Officer proceeded to examine the complainant in purported compliance of s. 70(b) of the said Act, and recorded the complaint in the case book. The identity of this Labour Officer is not established as the record from p. 4 onwards does not identify the signature of the officer in question, unlike the situation for the document in p. 2, where the signature of the Labour Officer is identified as that of "C. Pathmanapan". The Labour Officer who carried out the procedural requirement under s. 70(b) has recorded as follows in the case book (at p. 4 of the Record of Appeal)

> Encik Abu Karim bin Baharam **mengesahkan** dan bercakap dalam Bahasa Malaysia ... (emphasis provided)

The appellant has taken issue over this and complains that the Director General has failed to examine the complainant on oath or affirmation, as it is mandatory under s. 70(b) of the Employment Act 1955, before the summons in the prescribed form is issued against the appellant (under s. 70(c)) and, thereafter, an enquiry carried out in conformity with s. 70(g) to decide on the matters in issue.

The Oaths and Affirmations Act 1949 (Act 194) in s. 9 states:

> Oaths and affirmations made under section 6 or section 7 shall be administered according to such forms and with such formalities as may be prescribed by the rules made by the Rules Committee and, until such rules are made according to the forms and formalities in use at the commencement of this Act.

Section 6 of the said Act sets out the person by whom oaths are to be taken and s. 7 allows affirmations to be made *in lieu* of an oath. According to *Jowitts Dictionary of English Law* 2nd edn, the Oaths Act 1888, allows every person who declares that taking of an oath is contrary to his religious belief or that he has no religious belief to affirm, instead of taking an oath, in all places and for all purposes where an oath is required by law. A form of affirmation sufficient to satisfy requirement of this Act is:

> I, A. B. solemnly and sincerely declare as follows (or "that as touching the matters in question I will speak the truth the whole truth and nothing but the truth").

According to *The Concise Oxford Dictionary* (5th edn):

> "Oath" means a solemn appeal to or revered or dreaded person or object in witness that the statement is true;
>
> "Affirm" means make affirmation, and "affirmation" means solemn declaration by person who conscientously declines taking an oath.

Going by the *Istilah Undang-Undang* by Dewan Bahasa dan Pustaka Edisi Semakan 1986, the appropriate word for "oath" and "affirm" in Bahasa Malaysia would be "sumpah" dan "berikrar", respectively.

The use of the word "mengesahkan" means confirm and does not connote the gravity and solemnity conveyed in the administration of the oath or affirmation. In the grounds of decision, at p. 129 of the Record of Appeal, the Director General states at para. 1.2 that the Labour Officer, Encik C. Pathmanapan "telah memeriksa (examined) pengadu dan 'on affirmation' mencatat kenyataan pengadu seperti kehendak s. 70(b) akta tersebut.", without establishing the basis for coming to the conclusion that the word "mengesahkan" was in fact used in relation to an affirmation, by the Labour Officer in question.

The requirement, under s. 70(b) for the Director General to examine the complainant on oath or affirmation as soon as practicable after the complainant has presented a written statement of his complaint under s. 70(a), is mandatory. However, whether a failure to administer the oath or to affirm the complainant before examining him can amount to a defect that went to jurisdiction which rendered all subsequent proceedings and steps taken under s. 70 void, is a question that can be readily determined, upon a careful perusal of the Oaths and Affirmations Act 1949. Now s. 12 of the said Act states:

> No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

This provision in the Oaths and Affirmations Act 1949 clearly saves the entire proceeding that took place at the Labour Office Melaka and, therefore, despite the persuasive arguments that the complainant had not been examined on oath/affirmation, I rule that the said defect, if any, is a

mere irregularity and, does not go to the root of jurisdiction. The irregularity, upon a consideration of the whole proceedings before the Director General, has not occassioned an injustice to the appellant. The defect is not an illegality. The irregularity was more than sufficiently cured when all the evidence recorded on behalf of both the appellant and the respondent at the enquiry was in fact taken on oath, according to the record (see pp. 8 to 90 of the Record of Appeal).

The remaining grounds turn on the question as to whether the appellant and respondents had entered into an agreement "to be paid at an agreed rate in accordance with the task, that is specific amount of work to be performed, and not by the day or by the piece".

Before the Director General the point raised was initially:

> whether there was a "contract of service" or a "contract for service" and then subsequently,
>
> whether the work carried out by the respondents was "task work" under s. 60B, and
>
> whether if it was in fact "task work", it attracted the provisions of Part XII of the Employment Act 1955.

From the notes produced from the case book, the appellant was not clear as to its own position in regard to the above issues. There was undisputed evidence that after the respondents had lodged their complaint against the appellant at the Labour Office, the appellant had in 1991, some 4 to 5 years after the commencement of the employment of the respondents, attempted to get the respondents to sign a written form of contract, as shown in pp. 214, 216 of the Record of Appeal, and marked as C10 and C11.

Careful perusal of these documents establish certain facts, namely:

(1) the respondents were employed by the appellant as bus drivers;

(2) they were to be paid monthly salary of RM500 (inclusive of extra time);

(3) EPF was to be paid by the employer on RM350, basic monthly pay;

(4) Sunday was a rest day on rotation;

(5) paid public holidays were Hari Raya Puasa and Hari Raya Haji; and

(6) one month's notice for termination of employment.

It appears that only the first respondent had signed the contract and, upon the refusal of the other respondents to sign this document, resulted in instant dismissal without any notice. The appellant contends that because it was agreed that the respondents be paid a lump sum of RM500 per month to drive the bus kilang ferrying workers to and from the factories for three shifts the situation is covered by s. 60B of the Employment Act 1955 and, is therefore, "task work". It has been further submitted that it does not attract the benefits provided in Part XII of the Employment Act 1955.

It is important to understand that certain types of work description may well fall into the frame envisaged by s. 60B of the Employment Act 1955, for example, a driver employed by a family. The job entails the driving of the employer to and from the residence and the place of work and, the driver is bound to carry out the orders and directives of his employer. There may well be long hours of inactivity or standby. However, this does not mean that the employer is exempt from paying overtime, rest day and public holiday wages and such other benefits that may be provided in the Employment Act 1955. There is no magic in the term "task work".

Clearly, even if the employer has agreed to pay at an agreed rate in accordance with the task as envisaged in s. 60B, the Act does not exempt the employer from giving the employee all the benefits provided under Part XII of the Employment Act 1955, if the circumstances of the case so warrants.

The Director General of Labour has made a correct finding that the contracts between the respondents and appellant are contracts of service and thus the respondents were entitled to the claims made by them. The Director General has meticulously applied the formula provided in s. 601 of the Employment Act 1955 and has set the same out in detail in his grounds of decision.

The appellant complains that the dates and figures were literally plucked out of the air by the Director General, in particular, rest days and public holidays. This is untenable because the appellant was at all times duty bound to keep records as to rest days and public holidays. No documents or evidence pertaining to these were produced by the appellant to cast doubt on the respondents' testimony. In the above circumstances, the appeal is dismissed with costs. The order of the Director General is affirmed.